
BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1963
Jan. 21, 22
Jan. 22

AND

GERTHEL L. LAMON ..... RESPONDENT.

Revenue—Income or capital—Income Tax Act, R.S.C. 1952, c. 148, s. 6(j), 139 (1)(e)—Sale of gravel—Payments "dependent on the use of land" —Profits from a business—Appeal allowed.

Respondent had owned farm land for twenty years the farming of which had been unsatisfactory. In 1957 she contracted for the removal and sale of gravel from specified portions of the land. She did not participate in any way in the removal of the gravel for which she received payment at an agreed rate per cubic yard. The Minister assessed her for income tax on the money so received after allowance for depletion in each of the years 1957 and 1958. An appeal from that assessment to the Tax Appeal Board was allowed and from that decision the Minister now appeals to this Court. The respondent contends that the payments so received related to the sale of the property and were not income and further that the payments were instalments of the sale price of agricultural land and specifically exempted under s. 6(*j*) of the *Income Tax Act*. The Minister contends that the payments were for the use of or production from land and taxable under s. 6(j) and also that the payments represented income from a business or were rent.

Held: That there was no sale of land, agricultural or otherwise, but the grant of a licence analogous to a *profit à prendre* and the payments were not exempted by s. 6(j).

1963

MINISTER OF NATIONAL REVENUE v. GERTHEL L. LAMON

2. That the payments were "dependent upon the use of land" within the meaning of s. 6(j) of the Act.
3. That the amounts received by respondent in each year were profits from a business within the meaning of "business" as found in s. 139(1)(e) of the Act.
4. That the appeal be allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at London.

F. J. Dubrule and *M. Barkin* for appellant.

J. W. Cram for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (January 22, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated May 31, 1961, which allowed the respondent's appeals from re-assessments to income tax dated May 9, 1960, and made upon her for the taxation years 1957 and 1958. In her return as filed, the respondent declared no taxable income for the 1957 taxation year and a net income of $2,684.47 for the 1958 taxation year. In re-assessing her for the 1957 taxation year, the appellant added a profit from sale of gravel amounting to $6,361.82, less a depletion allowance of $938.44, and assessed a tax of $781.90 and interest. In the re-assessment for 1958, the appellant added to the respondent's declared income similar profits on gravel sales amounting to $7,911.06, less depletion of $1,100, and assessed an additional tax of $1,367.07 and interest in respect thereof. Following Notices of Objection, the Minister by Notification confirmed the said re-assessments.

The following facts are not in dispute. In August, 1937, the respondent purchased for $4,000 parts of the south half of Lots 5 and 6 in the 4th Concession of the Township of London, County of Middlesex, consisting of a residence and other buildings, and some 20 acres of land. Previously she had been associated with her husband in the operation of a bakery in London. Attempts to farm the property were unsuccessful as the soil was not satisfactory. At some unspecified date it was found that there were deposits of

gravel in commercial quantities on the property, but the respondent did nothing about the gravel until 1957.

On May 1, 1957, the respondent entered into an agreement with Riverside Construction Co. Ltd. (Exhibit 1) in which the respondent is called "the vendor" and the company "the purchaser". In the recitals, after giving a description of the property owned by the defendant, it is recited:

> AND WHEREAS the Parties have staked a certain part of the said lands, approximately 170 feet by 330 feet and the vendor has agreed to permit the Purchaser to remove all gravel from the said part of the said lands as staked, on the terms and conditions hereinafter contained.

Clauses 1, 2, 4 and 5 of the Agreement are as follows:

> 1. The Purchaser shall have the right to enter upon the said part of the said land as staked at any time after the date hereof and to remove therefrom all the gravel and stripping from the portion of the said lands, and for such purposes to be permitted to take on to the property such equipment as they may require for such purposes.
>
> 2. The Purchaser will keep a record of all the gravel and stripping removed from the premises and will pay to the Vendor at the rate of 12¢ per cubic yard, bank measurement, such amount as may be due to the Vendor on the first day of each month according to these records.
>
> 4. The Purchaser agrees to pay the full purchase price for all gravel removed from the said part of the said premises on or before the first day of August, 1957, and in the event that there is still gravel to be removed on that date, will pay to the Vendor such additional amount in cash as an estimate will determine of the balance of the gravel which has not been removed by the Purchaser as of that date and all of such gravel shall be removed from the premises on or before the 1st of October, 1957 upon which date all rights under this agreement shall cease.
>
> 5. The Vendor covenants with the Purchaser that she has good right and full power to sell the said gravel, notwithstanding any act of the Vendor or any other person whomsoever, except for such municipal restrictions concerning it for which the party of the first part makes no representations.

The Agreement further provided that the purchaser at its own expense would build access roads to the part so staked for the purpose of removing the gravel, such roads to become the property of the vendor at the expiry of the contract.

On October 22, 1957, a similar agreement (Exhibit 2) was entered into by the respondent with T. J. Branton Co. Ltd., by which that company was given similar rights to enter upon and remove gravel, fill and stripping from a portion of the said lands having an area of 920 feet by 330 feet, paying therefor 13½ cents per cubic yard, bank

1963

MINISTER OF NATIONAL REVENUE v. GERTHEL L. LAMON

Cameron J.

measurement. So far as this appeal is concerned, there was otherwise no material difference between the two contracts except that there was no time limit for the performance of the second contract and the evidence indicates that it was continued throughout 1958, 1959 and 1960, in each of which years substantial payments were received by the respondent. Finally in 1961, 10 acres of land which included the gravel pits were sold to Riverside Construction Co. Ltd. for $11,850.

It is admitted that pursuant to the said contracts, the respondent received monthly payments from the said two firms in payment for the gravel removed, totalling $6,361.82 in 1957, and $7,911.06 in 1958, and that the said respondent did not participate in any way in the operation of winning and removing the gravel, the entire operation being carried out by the two named companies who for such purpose brought suitable equipment on the property.

Notwithstanding the fact that the Minister is here the appellant, the onus is on the respondent to establish that there is error in fact or in law in the re-assessments (*Minister of National Revenue v. Simpson's Ltd.*[1]).

In the respondent's reply to the Notice of Appeal, it is submitted that the payments received by her were payments for the sale of the property and the contents thereof, which sales were frustrated by the provisions of a bylaw of the Township of London prohibiting the sale of less than 10 acres; and that the receipts therefrom constituted capital and not taxable income.

In the Minister's Notice of Appeal, it is submitted that such receipts in each year constituted either

(a) income from a business—namely, that of selling gravel—within ss. 3 and 4 of the *Income Tax Act;* or

(b) amounts received by the respondent which were dependent upon the use of or production from property and are therefore required to be included as income by virtue of the provisions of s. 6(j) of the Act; or

(c) rent, and were therefore part of the respondent's income as being income from property under ss. 3 and 4.

[1] [1953] Ex. C.R. 93.

I shall first consider the provisions of s. 6(*j*) which reads:

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (j) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph.

Counsel for the respondent, while submitting that the amounts received were not dependent upon use or production from property, namely land, or instalments of the sale price of land, also submitted that if they were instalments of the sale price of land, they were instalments of the sale price of *agricultural* land and therefore were exempted by the terms of s. 6(*j*).

In my opinion, there was here no "sale of land", agricultural or otherwise. The ownership of the land remained in the respondent at all relevant times and it was not until 1961 that she sold the lands where the gravel pits were located. What the respondent did was to give to the two firms the right to enter upon the lands staked and to remove therefrom the gravel, using such equipment as they might require for such purpose, coupled with the right to construct and use access roads thereto. This, I think, is not a sale of land but rather a grant of a license analogous to a *profit à prendre*. The respondent cannot, therefore, avail herself of the concluding part of s. 6(*j*).

In the *Smethurst v. Davy* case[1], to which I will refer later, Wynn-Parry J. found that the transaction involved the grant of a *profit à prendre,* and in the Court of Appeal, the Master of the Rolls specifically stated that Wynn-Parry J. came to a correct conclusion and that he agreed with the reasons for his judgment. At p. 598, Wynn-Parry J. said:

> I would have no hesitation . . . in concluding that here the transaction did not involve any sale and purchase, but a licence to work the gravel pit, that is, a *profit à prendre*.

In my opinion, the amounts received were amounts that were dependent upon use of property. It may be noted here that property as defined by s. 139(1)(*ag*) includes real property. In accordance with the terms of the contracts, the amounts to be received by the respondent were dependent

[1] 37 T.C. 593.

1963

MINISTER OF NATIONAL REVENUE v. GERTHEL L. LAMON

Cameron J.

upon the number of cubic yards of gravel removed from the premises. Does the right so conferred by the respondent to enter upon her property and to remove gravel therefrom constitute a "use of land"? A similar phrase was considered in *Smethurst (H.M. Inspector of Taxes) v. Davy*[1], a case decided by the Court of Appeal in 1957. The headnote reads as follows:

> The taxpayer was the occupier of land on which were certain gravel pits. She gave permission for gravel to be excavated from the pits and received payments based on the amount of gravel taken.
>
> On appeal to the Special Commissioners against assessments to Income Tax under Case VI of Schedule D in respect of these payments, the taxpayer contended that the payments were made as the purchase price on sales of gravel and not for any easement over or right to use any land within the meaning of Section 31 of the Finance Act, 1948. For the Crown it was contended that the payments were made, not in respect of a sale of the gravel, but for a right to make use of the land within the meaning of Section 31, and were accordingly brought into charge to tax by virtue of the Section. The Special Commissioners allowed the appeal.
>
> Held, that the payments in question were for a right to use land and fell within Section 31(1)(d), Finance Act, 1948.

The section of the *Finance Act,* 1948 referred to, reads as follows:

> 31. (1) As respects income tax for the year 1949-50 and all subsequent years of assessment— . . .
>
> (d) profits or gains arising from payments for any easement over or right to use any land in the United Kingdom made to the person who occupies that land, whether he occupies it for the purpose of a trade, profession or vocation or otherwise, shall, except so far as the payments are chargeable to tax under section twenty-one of the Finance Act, 1934, be taken into account in computing the profits of the trade, profession or vocation or as annual profits or gains chargeable under Case VI of Schedule D, as the case may be.

The judgment of Lord Evershed, Master of the Rolls, which upheld the judgment of Wynn-Parry J. who had reversed the finding of the Special Commissioners, was concurred in by the other Judges in the Court of Appeal. It is a lengthy judgment and I shall cite only those parts which are especially referable to the meaning of the phrase "use of land". At p. 602, the Master of the Rolls said:

> I turn first to what I have called the first point, namely, that this right is not a use of land as that phrase is used in the paragraph. It is quite true that the phrase "use of land" might with advantage have been expanded. It might, for example, have been interpreted by a definition paragraph such as is found in Section 21 of the Finance Act of 1934. But

[1] 37 T.C. 593.

in my judgment it is clear that a profit of this kind is a use of land as that phrase would be understood to anyone having knowledge of real property law, and I think that the phrase in the paragraph must be taken at least to be addressed to such a person. I think that that view follows inevitably from the speeches, particularly three of the speeches, in the House of Lords in Scott v. Russell, 30 T.C. 394; [1948] A.C. 422. In the course of his judgment Wynn-Parry, J., said:

> "That the latter activity constitutes 'using land' is established by the decision of the House of Lords in *Russell v. Scott,* [1948] A.C. 422. In the course of his speech Viscount Simon said, at page 432 (30 T.C., at p. 423): 'The digging and carrying away of sand or of gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times'. Lord Simonds said, at page 434 (Ibid., at pp. 424-5): 'I need go no further into the history of this catalogue than to say that with some additions it goes back for nearly one hundred and fifty years. During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay and I cannot doubt but that during that time and before it the owners of such pits have been accustomed in greater or less degree to exploit them not only for their own use but by profitable sales.' Finally, at page 438 (30 T.C. at p. 428), Lord Oaksey said: 'Now, the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land'."

Wynn-Parry, J., went on as follows:

> "The problem which the House had to consider in that case was quite different from the one before me, but the observations which I have quoted appear to me to be quite clearly intended to be statements of general application, and not uttered for the limited purpose of resolving the particular question before the House, namely, whether the activity of a farmer in permitting contractors to dig and carry off sand from his farm constituted a concern of the like nature to those enumerated in Rule 3 of No. III of Schedule A or whether his whole farm ought to be assessed under No. I. It follows that if the occupier permits another to do any of the acts referred to above, including the extraction of gravel, that other is using the land. Here, then, Fosters were using the land, paying a consideration which gave them the right to do so."

In my judgment, there is no answer, at any rate in this Court, to the argument as it was here presented by Wynn-Parry, J.

In my opinion, the problem under this section of the Act comes down in the end to one single point. Was the right here granted, the right to come on to the land and excavate and take away gravel, a *use of land* as that phrase should be understood in its context here? Following the principle stated in the *Smethurst v. Davy* case, I have come to the conclusion that the receipts here in question were dependent upon the use of land and were therefore within the ambit of s. 6(*j*).

Further support for this view is found in the dissenting judgment of Cartwright J. in *Orlando v. Minister of*

1963

MINISTER OF NATIONAL REVENUE v. GERTHEL L. LAMON

Cameron J.

National Revenue[1]. In the latter report, the facts are summarized in the headnote, as follows:

> In 1944, the appellant was a shareholder in a company operating a mushroom farm, on the outskirts of Toronto, of which her late husband was president and principal shareholder. Thinking that the farming operations might be forced to move by the growth of the city, she bought a farm as an alternative site for the business and worked it by hired help for several years. About once a year she sold topsoil to the mushroom farm. She refused other offers for the topsoil and was not engaged in the business of dealing in it apart from the sales to her husband's company. In 1953, she was forced to sell a portion of her farm as the Ontario Government was building a highway across her land. She sold the land to the highway contractor on condition that he move the topsoil on the purchased property onto the remainder of her farm. She then sold this topsoil to the mushroom farm in lots, the first for $18,500 and a year later a second lot for $1,500. The appellant entered these sums as capital gains, but the Minister claimed that they were income within the meaning of Sections 3 and 4, or alternatively produce of property under Section 6(j), now Section 6(1)(j) of the Act. The Income Tax Appeal Board allowed the appellant's appeal.

The decision of the Tax Appeal Board was reversed in this Court[2] and an appeal was taken to the Supreme Court of Canada and dismissed. The majority of the Court were of the opinion that in disposing of the topsoil, the appellant was engaged in an adventure in the nature of trade and that the profits therefrom were taxable income; no reference was made therein to s. 6(j). Cartwright J., however, in referring to the earlier payments of $2 per cubic yard for the topsoil, said at p. 116:

> In my opinion the payments of $2 per cubic yard of topsoil paid over the years by the Maple Leaf Mushroom Farm Ltd. to the appellant were payments for the granting to the company of a licence, analogous to a *profit à prendre,* permitting it to enter the lands of the appellant and take therefrom for its use a portion of the soil subject to payment therefor at the price agreed; from this it follows that the amounts so paid constituted taxable income of the appellant as being amounts received by her from the use of her property but not as profits from a business.

Further reference on this point may also be made to *Ross v. Minister of National Revenue*[3], and to *Waintown Gas & Oil Co. Ltd.*[4]

I am also of the opinion that the Minister is entitled to succeed on the ground that the amounts received in each year were profits from a business within the extended meaning of "business" as found in s. 139(1)(*e*). I have already stated the essential facts in the *Orlando* case. There, as here,

[1] [1962] S.C.R. 261.
[2] [1960] Ex. C.R. 391.
[3] [1950] Ex. C.R. 411.
[4] [1952] 2 S.C.R. 377.

the property was purchased as an investment, but in each year but one, from 1945 to 1953, Mrs. Orlando sold topsoil at the agreed price of $2 per cubic yard. In rendering judgment for the majority of the Court, Abbott J. stated that he agreed with the facts as found by Fournier J. in this Court and was in substantial agreement with his reasons and conclusions. In his judgment, Fournier J. said in part at p. 399:

> When the whole course of conduct of a taxpayer who had an investment in a farm indicates that in dealing with the topsoil of his property he is disposing of it in a way capable of producing profits and with that object in view and that the transactions are of the same kind and carried on in the same way as those of ordinary trading in that commodity, I am of opinion that he is engaged in an adventure or concern in the nature of a trade or in a scheme of profit making. In my view the fact that he is not advertising his goods nor selling them to the public at large is immaterial. On many occasions it has been held that a single transaction having the badges of an adventure or concern in the nature of a trade was sufficient to attract tax on the income realized therefrom.
>
> The repeated sales of the topsoil in the manner described by the respondent, in my opinion, had, with some refinement, all the characteristics of ordinary trading in the commodity in question. She did not buy the topsoil and sell it, but she acquired a farm the topsoil of which was found suitable for the producing of mushrooms and she sold it to the owners of a mushroom farm. She sold it on the property at $2 per cubic yard and the buyers undertook to take delivery on the farm at designated places, to condition it and cart it away. She incurred no expense in the operations involved and the sales went on for years.

In the instant case, the evidence establishes that the respondent from 1957 to and including 1960 sold gravel, and in doing so in the manner I have described I am satisfied that she embarked on a scheme for profit making and engaged in an adventure in the nature of trade. On this point I am unable to distinguish the facts in this case from those in the *Orlando* case.

In view of these conclusions, it is unnecessary to consider the further submission of the respondent that the amounts in question were taxable income as being rent from property.

Accordingly, and for these reasons, the Minister's appeal will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent for each year affirmed.

The appellant is also entitled to be paid his costs after taxation.

Judgment accordingly.